

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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new rules should be suitable to the technology and distribution format to be applied.²

In a footnote, the Commission asks whether the local exchange carriers (LECs) as wireless cable companies on LMDS would have anti-competitive implications, and if so, what regulatory responses would be appropriate.³

The NPRM was initiated in response to petitions for rulemaking filed by the Suite 12 Group, Video/Phone Systems, Inc., and Harris Corporation. Based on the record compiled, the Commission established that the 28 GHz band is not being fully utilized and that it should be reassigned to provide for video programming. The Commission tentatively concluded that *video programming will be the largest and most commercially significant use of this spectrum, and will stimulate additional competition to franchised cable companies, wireless cable companies, and other video services providers.* Accordingly, the Commission proposes to redesignate the 28 GHz band fixed service allocation to any video or other telecommunications use.⁴

II. DISCUSSION

As an initial matter, the Commission seems to suggest that LECs be precluded from operating as wireless entities offering LMDS.⁵ USTA submits that there is no basis to infer that the LECs should not be permitted to offer LMDS. Neither the Cable Act, 47

² id. at ¶¶ 1-4.

³ id. at n.12.

⁴ id. at ¶¶ 14-16.

⁵ id. at n.12.

U.S.C. §521 et. seq.⁶ nor the Modification of Final Judgment⁷ currently prohibits the LECs from providing wireless cable services. LEC participation in the provision of LMDS would help to promote service innovation and competition. It could also mean that LMDS would be made available to the public more quickly.

LEC participation in LMDS would not raise any competitive issues that merit their being barred from its provision. With the proliferation of service providers in the video market, and the lack of any arguable "bottleneck," exchange carriers would lack any market power to foreclose or impede competition. To the extent that the LECs lack any market share in LMDS, and thus lack the ability to act anti-competitively, any regulatory restrictions placed on them would be arbitrary.

1. Reassignment of the 28 Ghz Band

The Commission proposes that the 28 GHz band be licensed initially in two blocks of 1000 MHz each to two different carriers. Each assignment will be optimized on a cell-by-cell basis, for video services on the one (horizontal/vertical) polarization, and for other services on the other (vertical/horizontal) polarization. The Commission also proposes to divide each 1000 MHz band into channels of 20 MHz each, giving licensees of the respective blocks the flexibility to use or lease each cell, and to provide a wide variety of services. The Commission seeks comments on this reassignment

⁶ The Cable Act bars most LECs from offering video programming inside their own telephone service areas. 47 U.S.C. § 533(b).

⁷ See United States v. American Tel. and Tel. Co., 552 F.Supp 131 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983). The information services restriction of the Consent Decree has been removed. See United States v. Western Elec. Co., 767 F. Supp. 308, 332-33 (D.D.C. 1991), appeal pending.

scheme.⁸

While USTA is not opposed to the Commission's tentative conclusion that the 28 GHz band should be redesignated to promote LMDS, the proposed reassignment of 2000 MHz, giving 1000 MHz to one licensee each, does not serve the public interest. It would not promote the efficient use of the spectrum, and appears to be far out of proportion compared to assignments made for other services. The Commission's tentative decision appears to be based on the Suite 12 Group's assertion that they have perfected the so-called FM "millimeter wave technology" that provides two-way capabilities for video services. Even though tests will be conducted further under a pioneer's preference license granted by the Commission, the technology in question is new and its performance results are still unproven. In effect, the proposed reassignment would allow two licensees exclusive use of an inordinately large amount of scarce spectrum resource – 1000 MHz per licensee with fifty channels of video capability using the Suite 12 technology. By contrast, only 220 MHz is now being considered for allocation to personal communications service (PCS).⁹ The entire VHF and UHF broadcast TV bands only occupy about 400 MHz to deliver 67 video channels. Hence, the Commission's proposed reassignment scheme may be premature and overly-generous. It is not supported by the record.

Furthermore, the proposed reassignment does not take into consideration the future spectrum needs of point-to-point microwave radio services. The Commission is

⁸ id. at ¶¶ 20 - 22.

⁹ See Notice of Proposed Rulemaking and Tentative Decision, Amendment of the Commission's Rules to Establish New Personal Communications Services, Gen Docket No. 90-314, 7 FCC Rcd ____, released August 14,, 1992.

correct that at present, point-to-point microwave services have not filled the 28 GHz band. This is because some lower frequencies are still available. It is well recognized, however, that as microwave frequencies in lower bands are filled, users move up to the next available band or bands. The vacancies in the 28 GHz band may fill rapidly as lower bands become more congested. USTA understands that there are approximately 7600 licensed stations for point-to-point microwave services in the 23 GHz band, and that at least 24 manufacturers are involved in producing equipment for that band. It is safe to assume that the next logical move would be from the 23 GHz to the 28 GHz band. And, that may happen sooner than expected.

In sum, the Commission should exercise the utmost caution in reassigning the two 1000 MHz blocks in the 28 GHz band to LMDS. Initially, the Commission should allocate only the higher 1 GHz band to LMDS, to be divided equally between the two licensees. The remaining 1 GHz band should be reserved for point-to-point microwave or other radio services to accommodate future demand, which could be considerable. The LMDS licensees could, of course, be allowed to petition for shared use of the remaining 1 GHz if their new technology develops and matures as claimed.

2. Technical Standards

The Commission seeks comments on the need for technical standards, and specific proposals for power, modulation requirements, channelization, bandwidth, emission characteristics, frequency stability, and antenna characteristics.¹⁰

USTA endorses the Commission's proposal for limited technical regulations, covering what is necessary to ensure adequate interference control and coordination of

¹⁰ NPRM at ¶ 23.

services at the interfaces of designated service areas within the allocated frequency spectrum. Technical standards should be limited to addressing only potential interference with other providers outside the boundaries of the serving areas. Attempting to do anything more would severely inhibit service innovation.

3. Service Areas

The Commission proposes to license LMDS using the 487 "Basic Trading Areas" concept developed by Rand McNally in the 1992 Commercial Atlas and Marketing Guide. The Commission seeks comments on whether the Basic Trading Areas represent appropriately-sized service areas for LMDS, allowing licensees to take advantage of the economies of scale.¹¹

The Basic Trading Areas as proposed for LMDS would cover a serving area that is too large. Smaller carriers may not be able to participate in offering any LMDS service because of the large areas contemplated. These larger areas will include many rural areas where smaller carriers operate. USTA recommends that the use of Metropolitan Statistical Areas (MSAs) and Rural Statistical Areas (RSAs) as serving areas for LMDS will better meet the Commission's goals. The use of smaller serving areas will permit a greater number of service providers, which will, in turn, increase the capital available to develop the service, encourage technological innovation, and broaden the availability of LMDS to subscribers. It will also allow LMDS to be introduced more quickly to both less affluent and less populated rural areas. The early increase in equipment demand may also be expected to reduce the costs of deploying the service by contributing to economies of scale in manufacturing. MSAs and RSAs have been utilized successfully

¹¹ id. at ¶ 30.

for mobile services for a number of years. There is no reason for the Commission to introduce yet another market area definition for the provision of LMDS.

The Commission's proposed new rule §21.1010(a)¹² seems to imply that entities other than publicly-traded corporations may not apply simultaneously for more than one LMDS authorization in more than one serving area. It is conceivable that an exchange carrier whose stock is not publicly traded may have legitimate interests in multiple MSAs or RSAs, and would have an interest in more than one LMDS license. USTA requests clarification of that proposed rule to permit the same opportunity for closely-held licensees as it does for publicly-held licensees.

4. Preference Criteria

The Commission requests comments on its tentative decision to grant preferences for diversity and minority interests for LMDS.¹³ The Commission's tentative conclusion is consistent with § 309(i)(3)(A) and § 309(i)(3)(C)(i) of the Communications Act.¹⁴ To promote diversity in service provision, the Commission should not exclude local exchange carriers from this preference. Applicants such as small local exchange carriers who hold few licenses should have the same opportunity for preferential treatment under the law.

5. Settlements

To avoid insincere applicants from gaming the licensing process, the Commission proposes to forbid any settlements among applicants for LMDS, and any alienation of

¹² id. Appendix B, at 8.

¹³ id. at ¶ 37.

¹⁴ 47 U.S.C. §§ 309(i)(3)(A) and 309(i)(3)(C)(i).

interest in an application for LMDS.¹⁵ USTA agrees that each applicant should file an independent Part 21 application with the Commission and must also demonstrate that they are able to meet the Commission's revised settlement policies contained in Part 22 of the rules, 47 C.F.R. § 22, when they are finally adopted.¹⁶

6. License Term and Transfer of Control/Assignment

To further ensure that only sincere applicants interested in constructing and operating LMDS systems need apply, the Commission proposes that licensees be barred from transferring an LMDS license until the system has been constructed and is in operation.¹⁷ While USTA understands the Commission's objective to avoid insincere applications because they would impose tremendous burdens on Commission resources, a literal reading of the prohibition as proposed would seem to result in barring a qualified applicant from participating in the licensing process should it, for whatever reason, later discover a need to partner with another entity to complete construction of the facility.¹⁸ That partner may or may not have participated in the relevant lottery process.

There are real benefits in partnership, e.g., completion of the LMDS facilities in less time, wider availability of service, and greater ability to provide better quality

¹⁵ NPRM at ¶ 38.

¹⁶ The Commission has proposed settlement rule changes in Part 22. See Revision of Part 22 of the Commission's rules governing the Public Mobile Services, 7 FCC Rcd 3658, 3665 (1992).

¹⁷ NPRM at ¶¶ 39 - 41.

¹⁸ § 21.1015 of the proposed rules prohibits the sale, transfer, assignment or other alienation of any LMDS conditional license prior to completion of all construction authorized by the conditional grant. See NPRM Appendix B at 10-11.

service. Apparently, the proposed rule allows for partnership with a LEC or non-LEC entity so long as there is no change in ownership interests or a transfer of control to the new partner.¹⁹ Whether the new partner is a LEC or a non-LEC, the resulting entity should be treated no differently than other competitive service providers. Thus, the Commission should allow the successful applicant to partner with a LEC should such a need arise, provided that the applicant is qualified and otherwise meets the Commissions other standards.

III. CONCLUSION

USTA respectfully requests that its recommendations as set forth in these comments be adopted.

Respectfully submitted,

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March 16, 1993

¹⁹ See proposed rule § 21.1015(b), NPRM at Appendix B, pg. 11.

CERTIFICATE OF SERVICE

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